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Supreme Court of the United States,

OCTOBER TERM, 1904.

NO. 137.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

CITY OF OKLAHOMA CITY, PLAINTIFF IN ERROR,

vs.

FRANK McMASTER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

MOTIONS TO DISMISS AND AFFIRM, AND BRIEF IN SUPPORT THEREOF.

FRANCIS J. KEARFUL,
CHESTER HOWE,
Counsel for defendant in error.

[19,127.]

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Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 137.

CITY OF OKLAHOMA CITY, *Plaintiff in error*,

vs.

FRANK MCMASTER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

NOTICE OF MOTIONS TO DISMISS AND AFFIRM.

Notice is hereby given that the annexed motions to dismiss the writ of error and affirm the judgment appealed from will be submitted to the Supreme Court of the United States, at the Capitol, in the City of Washington, on November 28, 1904, at the coming in of the court on that day, or as soon thereafter as counsel can be heard, upon the record in the above entitled cause and upon printed briefs, a copy of which is served herewith.

New York, N. Y., October 29, 1904.

FRANCIS J. KEARFUL,
CHESTER HOWE,
Counsel for defendant in error.

To A. G. C. BIERER,
Counsel for plaintiff in error.

[19,127.]

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 137.

CITY OF OKLAHOMA CITY, *Plaintiff in error*,

vs.

FRANK McMASTER.

MOTIONS TO DISMISS AND AFFIRM.

STATEMENT OF FACTS AND OBJECTS.

Upon the record in the above entitled cause, Frank McMaster, defendant in error above named, moves the court to dismiss the writ of error of the plaintiff in error on the ground that the cause is one not legally cognizable by writ of error, and also to affirm the judgment appealed from on the ground that it is manifest the writ of error and appeal were taken for delay only.

The defendant in error obtained a judgment in the District Court of Oklahoma County, Oklahoma Territory, against the plaintiff in error, Oklahoma City, for recovery of the possession of certain described real estate, together with damages for the wrongful detention thereof (*record*, 48). This judgment was affirmed on appeal by the Supreme Court of the Territory (*record*, 57). For the purpose of bringing the judgment of the Supreme Court to this court for review, the city sued out a writ of error and also obtained the allowance of an

appeal (*record*, 15, 16). There being but one cause, it cannot be here both by writ of error and by appeal. Either one proceeding or the other will have to be dismissed. *Hurst* v. *Hollingsworth*, 94 U. S. 111; 100 U. S. 100, 102; *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264, 269; *Files* v. *Brown*, 124 Fed. Rep. 133, 136; *Lockman* v. *Long*, 132 Fed. Rep. 1.

BRIEF OF ARGUMENT.

I.

THE WRIT OF ERROR SHOULD BE DISMISSED.

The act of Congress of April 7, 1874, c. 80, § 2 (18 Stat. 27, 28), prescribes that the appellate jurisdiction of this court over "judgments and decrees" of the territorial courts "in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal." This statute makes the form of appellate proceeding depend on the single fact of whether there has been a trial by jury, not whether the case might properly have been tried by a jury. In the present case the parties waived a jury and proceeded to trial before the court (*record*, 25, 48). It follows that the writ of error was improper and should be dismissed and the case considered as depending upon the appeal alone. *Stringfellow* v. *Cain*, 99 U. S. 610, 612; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Story* v. *Black*, 119 U. S. 235, 236–237; *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 514, 515.

II.

THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

The jurisdiction of this court on the appeal depends upon the provisions of the act of Congress, *supra*, which contains the following (18 Stat. 28):

> "*Provided*, that on appeal, instead of the evidence at large, a statement of the facts in the case

> in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings, and judgment or decree."

The effect of this provision is to confine the court *in* its consideration of a case arising upon an appeal from a territorial court to the statement of facts and rulings certified by the court below. As Mr. Chief Justice Waite said, speaking for the court in *Hecht* v. *Boughton*, 105 U. S. 235, 236:

> "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and *upon an appeal to the statement of facts and rulings certified by the court below.* The facts set forth in the statement which must come up with the appeal are conclusive on us."

This statement of the effect of the statute has been quoted with approval and followed in subsequent cases. *Idaho Land Co.* v. *Bradbury*, 132 U. S. 509, 513–514; *Marshall* v. *Burtis*, 172 U. S. 630, 635.

As the court is confined in its consideration of the appeal to "the statement of facts and rulings" "which must come up with the appeal," it is clear that, in the absence of such a statement, there is nothing for the court to consider. *Gray* v. *Howe*, 108 U. S. 12, 13; *Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S. 109, 117; *Zeckendorf* v. *Zeckendorf*, 171 U. S. 686; *Cohn* v.

Daley, 174 U. S. 539, 544–545; *United States* v. *Hooe*, 1 Cranch, 318, 319–320.

The appeal is from the judgment of the territorial Supreme Court, and the statement of facts and rulings upon which alone this court is authorized to act should have been procured from that court. The only excuse for not procuring it would be the existence in the record of a sufficient statement of facts and rulings by the District Court, which the Supreme Court by the affirmance would be deemed to have adopted.

As Mr. Chief Justice Waite said, speaking for the court, in *Davis* v. *Fredericks*, 104 U. S., 618, 619:

> "As such appeals lie to this court only from the Supreme Court of a territory (Rev. Stat., sect. 702), it follows that *the statement, both as to facts and rulings, on which we are to act*, must be made directly or indirectly by that court."

And in *Cannon* v. *Pratt*, 99 U. S. 619, 621–622:

> "When the Supreme Court affirms the judgment of the District Court upon findings of fact made by the District Court, the Supreme Court in effect adopts such findings as it own for the purposes of appeal to this court."

No such statement "both as to facts and rulings" was made directly by the Supreme Court. True, certain facts and rulings upon which it proceeded to a decision are set forth in the opinion delivered by Irwin, J. (*record*, 57–71). But it is settled that this is not a compliance with the statute. Error cannot be predicated upon statements contained in an opinion. It cannot be resorted to for such a purpose. *Thompson*

v. *Ferry*, 180 U. S. 484, 485; *Stone* v. *United States*, 164 U. S. 380, 383; *Saltoustal* v. *Birtwell*, 150 U. S. 417, 419; *Dickinson* v. *Planters' Bank*, 16 Wallace, 250, 257; *Insurance Co.* v. *Tweed*, 7 Wallace, 44, 51.

The statement of facts and rulings made by the District Court, which the Supreme Court will be deemed to have adopted as its own, are contained in the "Journal Entry of Judgment," signed by the district judge and agreed to as "satisfactory" by the counsel for defendant (*record*, 47–48), wherein it is stated that—

> "the court found, ordered, adjudged and decreed: That the plaintiff is the legal and equitable owner and entitled to the possession of the following described real estate and premises situated in Oklahoma County, Territory of Oklahoma [description by metes and bounds]; that the defendant since November 14th, 1892, has unlawfully kept the plaintiff out of possession and now unlawfully keeps the plaintiff out of possession of said described property; that the value of the use of said property since November 14, 1892, is $250.00 per year; that the plaintiff do have and recover of and from the defendant the possession of said described real estate, together with damages for the wrongful detention thereof in the sum of $250.00 per year for the period of three years next prior to the date of the commencement of this action up to the date of the execution of this judgment, and that the plaintiff have judgment against the defendant for the costs of this action taxed at ———, to which order and judgment of the court, and to each and every part thereof the defendant then and there excepted and excepts."

Manifestly, this statement of itself contains no suggestion of error. The findings and rulings set forth properly support the judgment, and, according to the result of the foregoing decisions, it will be presumed that such findings and rulings are correct.

As it is apparent that if the case is kept here longer it will be for delay only, the motion to affirm should be granted. *Zeckendorf* v. *Johnson*, 123 U. S. 617, 618.

FRANCIS J. KEARFUL,
CHESTER HOWE,
Counsel for defendant in error.

STATE OF NEW YORK, }
New York County, } ss.:

FRANCIS J. KEARFUL, being duly sworn, says: On October 29, 1904, at New York, N. Y., I deposited in the mail a letter containing three copies of the foregoing notice and brief, addressed to Hon. A. G. C. Bierer, Guthrie, Oklahoma, he being the counsel of record for the plaintiff in error, Oklahoma City, and that being his proper address. Said letter was duly postpaid, and the time when it was so mailed was at such time as to reach said counsel, by due course of mail, more than three weeks before November 28, 1904, the time fixed by the notice for the presentation of the motions therein referred to.

Subscribed and sworn to }
before me this day }
of November, 1904. }